Gabriel v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KG 23 OF 1991
CHONG SIEW FAI J
5 SEPTEMBER 1991

Criminal Procedure *— Police custody — Validity — Accused detained for more than 24 hours without order of magistrate — Accused pleaded guilty to charge — Whether subsequent criminal proceedings against accused rendered illegal — Criminal Procedure Code (FMS Cap 6) s 28(3)*

Criminal Procedure *— Appeal — Accused had pleaded guilty at trial — Whether accused could appeal against conviction — Criminal Procedure Code (FMS Cap 6) s 305*

Criminal Procedure *— Revision — Accused had pleaded guilty at trial — Appeal record did not show whether accused understood nature of his plea — Whether court could exercise discretion to revise — Whether omission in appeal record had occasioned a failure of justice*

The accused was arrested at about 2am on 28 April 1991 and was only brought before a magistrate on the morning of 30 April 1991. He was charged with theft of property and he pleaded guilty to the charge. The magistrate sentenced him to a year's imprisonment and a $2,000 fine. The accused appealed to the High Court against his conviction and sentence. Alternatively, he applied for a revision of his case. The accused contended firstly that since he was detained for more than 24 hours without an order of a magistrate, s 28(iii) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') had been breached and this vitiated the subsequent proceedings in the magistrate's court. He also argued that the appeal record did not indicate that he had understood the nature of his plea.

Held, allowing the appeal in part:

(1) Since the accused had pleaded guilty unequivocally, his appeal against conviction was precluded by s 305 of the CPC.

(2) The contravention of s 28(iii) of the CPC in itself did not render illegal the subsequent proceedings in the magistrate's court. The accused had not been materially prejudiced by the breach of s 28(iii) of the CPC and no failure of justice had therefore been shown.

(3) The omission in the appeal record regarding the accused's understanding of the nature of his plea had not occasioned a failure of justice and this was not a case to justify the exercise of the discretionary power of revision.

(4) The offence committed by the accused was not a minor one. The imprisonment sentence was, however, reduced to eight months because of the prosecution's erroneous oral statement that one of the items of the stolen property was not recovered, when in fact all items were recovered.

(5) A fine is normally imposed to ensure that the offender does not profit from the offence. In this case all the stolen items were recovered and the accused had not derived any monetary gain from the offence. The fine was therefore set aside.

[Bahasa Malaysia summary

Si tertuduh telah ditangkap pada kira-kira jam 2 pagi pada 28 April 1991 dan hanya telah dibawa ke hadapan magistret pada waktu pagi 30 April 1991. Beliau telah dituduh atas kesalahan pencurian harta dan telah mengaku salah atas pertuduhan itu. Magistret tersebut menjatuhkan hukuman penjara selama setahun dan denda sebanyak $2,000 ke atas si tertuduh. Si tertuduh memohon kepada Mahkamah Tinggi terhadap sabitan dan hukumannya. Yang lainnya, si tertuduh telah memohon penyemakan kesnya. Si tertuduh berhujah pada pertamanya bahawa oleh kerana beliau telah ditahan selama lebih daripada 24 jam tanpa perintah magistret, perbuatan ini melanggar s 28(iii) Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu') dan merosakkan prosiding yang berikut dalam mahkamah magistret. Si tertuduh juga berhujah bahawa rekod rayuan tidak menunjukkan yang beliau memahami apakah sebenar pli yang dibuatnya.

Diputuskan, membenarkan sebahagian rayuan itu:

(1) Oleh kerana si tertuduh telah mengaku salah tanpa sebarang keraguan, rayuan beliau terhadap sabitannya dicegah oleh s 305 Kanun itu.

(2) Pelanggaran s 28(iii) Kanun itu dalam sendirinya tidak menyebabkan prosiding yang berikut dalam mahkamah magistret menyalahi undang-undang. Pelanggaran s 28(iii) Kanun itu tidak memudaratkan si tertuduh secara penting dan oleh kerana itu tiada kegagalan peradilan telah ditunjukkan.

(3) Peninggalan dalam rekod rayuan berkenaan dengan pemahaman si tertuduh akan apakah sebenarnya pli yang dibuatnya tidak menyebabkan kegagalan peradilan dan ini bukanlah satu kes mewajarkan penjalanan kuasa budi bicara penyemakan.

(4) Kesalahan yang dilakukan oleh si tertuduh bukanlah satu kesalahan kecil. Hukuman penjara, akan tetapi, dikurangkan kepada lapan bulan kerana pernyataan lisan pihak pendakwa yang salah bahawa satu daripada barang-barang yang dicuri tidak didapat kembali, yang sebenarnya semua barang-barang telah didapat kembali.

(5) Satu denda biasanya dikenakan untuk memastikan bahawa pesalah tidak untung daripada kesalahan itu. Dalam kes ini semua barang pencurian telah didapat kembali dan si tertuduh tidak memperolehi sebarang keuntungan kewangan daripada kesalahan itu. Denda tersebut oleh kerana itu diketepikan.]

Cases referred to

1 *Tang Kee Chie v PP* [1987] 1 MLJ 430 (distd)
2 *Chua Ah Gan v PP* [1958] MLJ liv (refd)
3 *Subramaniam & Anor v PP* [1976] 1 MLJ 76 (distd)
4 *Heng Kim Khoon v PP* [1972] 1 MLJ 30 (distd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 28(3), 117, 173(a), 305, 422

Penal Code (FMS Cap 45) s 380

Ani Solep (Ani Solep & Co) for the accused.

Thomas Akin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Chong Siew Fai J: In the magistrate's court at Kuching the appellant pleaded guilty to the theft of a refrigerator, a radio cassette and an electric fan in a handicraft factory used for the custody of property, an offence punishable under s 380 of the Penal Code (FMS Cap 45). He was convicted, sentenced to one year's imprisonment and a fine of $2,000 in default six months' imprisonment.

He appeals against the conviction and the sentence. Alternatively, he asks for a revision of his case.

Respecting the appeal against conviction, this is precluded by s 305 of the Criminal Procedure Code (FMS Cap 6) since the appellant pleaded guilty unequivocally in the court below.

Counsel for the appellant referred to *Tang Kee Chie v PP*[1] which, incidentally, was my decision. There were two charges in that case based on acts so connected as forming one transaction. Dealing with the first charge, counsel for the appellant therein submitted a short point of law that it was wrong to charge and convict the appellant on the two offences based on acts forming one transaction. The dismissal of the appeal on that point of law would appear to have given the impression that I allowed the appeal to be heard despite the plea of guilty — a situation permissible under s 2(1) of the Criminal Appeal Act 1968 in England. I would take this opportunity to point out that the main feature in *Tang Kee Chie*'s case[1] was that the facts as presented by the prosecution failed to disclose an offence having been committed in respect of the second charge. An essential ingredient constituting the offence charged was lacking. It was on that basis that the case proceeded.

The appeal against conviction in the instant case is struck out.

I shall now consider the alternative application for revision in respect of the conviction. In this connection, counsel for the appellant relied on grounds (ii) and (iii) of appeal. The arguments of counsel, I am compelled to point out, drastically departed from the grounds stated in the petition of appeal. In the circumstances, I would only deal with the arguments as advanced though, strictly, they should conform to the grounds formulated.

Under ground (ii), it was pointed out that there had been a breach of s 28(iii) of the Criminal Procedure Code (FMS Cap 6) in that the appellant was detained for more than 24 hours without an order of a magistrate under s 117 of the said Code. It was not disputed before me that the appellant was arrested by the police on 28 April 1991 at about 2am and was not brought before a magistrate until the morning of 30 April 1991 — detention of some 34 hours in excess. Counsel stated that in her opinion a breach of s 28(iii) could not be cured by s 422 of the said Code. I take the submission to mean

that the breach would render the subsequent proceedings bad. She was, however, unable to cite any authority in support. I am not persuaded by the view. It was not shown, and I fail to see, how the detention in contravention of the said s 28(iii), even if true, would, in itself, vitiate or render illegal the subsequent proceedings in the magistrate's court in which the appellant pleaded guilty to the offence charged. If the appellant considers himself aggrieved by the detention, it is for him, if he so wishes, to seek appropriate legal redress.

It has not been suggested, nor do I find, the appellant in any way materially prejudiced by the breach of s 28(iii) so far concerning the court proceedings on 6 May 1991 in which he was convicted on his own plea of guilty and consequently sentenced. No failure of justice has been shown to have occasioned.

Under ground (iii), it was firstly contended for the appellant that s 173(a) of the Criminal Procedure Code (FMS Cap 6) had not been complied with in that the charge was not read and explained to him and that there was nothing saying that the appellant understood the charge. Section 173(a) requires, inter alia, a charge containing the particulars of the offence of which an accused is alleged to have committed to be read and explained to him. The record of appeal in the instant case clearly shows that the charge was read and explained in Bahasa Malaysia and also that there was, in fact, a subsequent occasion in which the appellant maintained the plea of guilty.

Counsel for the appellant referred to *Chua Ah Gan v PP*[2] which is a digest, as opposed to a full report, of the case. There Hepworth J stressed that as a matter of practice the record should make clear that the charge had been read, explained and understood. It is, of course, a good practice that all subordinate courts should heed.

Subramanian & Anor v PP[3] was also cited. There, in contrast to our present case, a joint plea was taken, and the learned judge in the exercise of the powers of revision set aside the convictions.

In our instant case nothing in the appeal record suggests or gives the slightest impression that the appellant did not understand the charge. The facts presented by the prosecution and admitted by the appellant clearly disclose that the offence had been committed.

Next, it was contended for the appellant that the learned trial magistrate failed to ascertain that the appellant understood the nature and the consequence of his plea. Counsel frankly conceded that this was not given as a ground of appeal and also that the record of proceedings showed that the appellant understood the consequences of his plea. Hence the only omission is that the record does not indicate that the appellant understood the nature of his plea ie the nature of the offence of theft in a building for custody of property he pleaded guilty to. Should the discretionary power of revision be exercised to set aside the conviction for that reason? The facts in the present case are simple and were admitted by the appellant as correct without any qualification. He pleaded guilty to the charge and, as stated earlier, he subsequently maintained the plea. After a careful consideration of the facts and the circumstances of the case, I come to the conclusion that the omission has not occasioned a failure of justice, and that this, in my

A opinion, is not a case justifying the exercise of the discretionary power of revision to set aside the conviction.

As regards the case of *Heng Kim Khoon v PP*[4] cited, all that need to be said is that there the matters stated by the accused in mitigation did not disclose that the offence charged had been committed and that the conviction on the plea of guilty ought not therefore to have been allowed to stand.

B I see no merit in the arguments advanced under grounds (ii) and (iii) for the application for revision.

I now come to the appeal against the sentence. As regards ground (iv),

(1) The points that the appellant —
C (a) had co-operated with the police;
(b) had shown remorse; and
(c) was of good character,
even if true, were brought to the notice of the learned trial magistrate. He cannot therefore be said to have failed to consider them.
(2) The point that the appellant was gainfully employed has no relevance.
D All the more reason he should not have committed theft.
(3) The fact that the appellant was a first offender and had no previous conviction had been considered by the learned trial magistrate.
(4) I disagree that the offence committed was a minor one.

The provision of a sentence of imprisonment in s 380 of the Penal Code
E (FMS Cap 45) is of mandatory nature. The maximum is ten years. But for the erroneous oral representation respecting the recovery of the refrigerator by the prosecution in the lower court, I would have been disinclined to interfere with the sentence of imprisonment imposed. As it turned out, while the 'facts of case' depicted that the stolen items *were recovered*, the prosecuting officer stated in the lower court that the refrigerator *had never*
F been recovered. For this reason I would reduce the sentence of imprisonment from one year to eight months. Since the appellant was arrested and detained on 28 April 1991, the eight-month custodial sentence is to run from that date.

As regards the fine, I do not think it should have been imposed. A fine
G is normally added to ensure that an offender does not profit from the offence. Here, according to the facts presented, all the stolen items were recovered. In any event, there is nothing indicating that the appellant had in any way derived any monetary gain from the theft committed. The fine of $2,000 and the six months' imprisonment in default are set aside.

In short,

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(1) the appeal against conviction is struck out;
(2) the application for the exercise of the powers of revision is refused; and
(3) the appeal against sentence is allowed to the extent that:
(i) the one-year imprisonment is reduced to eight months and is to run from 28 April 1991; and
I (ii) the fine of $2,000 and the jail sentence in default are set aside.

Appeal allowed in part.

Reported by Wong Kian Kheong